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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 698

UNITED STATES OF AMERICA ex rel.
TONY MARINO,

Petitioner,

vs.

RALPH H. HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, CHICAGO, ILLINOIS,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

IRVING GOODMAN
33 North LaSalle Street
Chicago 2, Illinois

EMIL M. CALIENDO and
NATHAN B. ENGELSTEIN
100 North LaSallle Street
Chicago 2, Illinois
Attorneys for Petitioner.

The Scheffer Press, Inc.—ANdover 3-6850

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Counsel for respondent correctly state the issue to be whether there is a lawful conviction of record upon which to predicate the order of deportation in this cause.

But, thereafter counsel blandly assume the very question at issue, namely that there is a lawful conviction and that therefore petitioner is making a collateral attack on the judgment of conviction and sentence entered by the Circuit Court of Winnebago County on to-wit, April 25, 1925.

Petitioner is not making a collateral attack on the judgment of the Circuit Court of Winnebago County. It is respondent who is making a collateral attack on the finding and judgment of this Court in *Marino* v. *Ragen*, 332 U.S. 561, which held specifically that Marino had been denied "due process" by the Circuit Court of Winnebago. Counsel for respondent argue, just as Judge Dusher of the Circuit Court of Winnebago County argued, that this Court was wrong, that Marino actually did get a fair trial, that Marino was not entitled to a new trial or a discharge. Yet this Court plainly stated in *Marino* v. *Ragen*, 332 U.S. 561, at page 565:

> "This case presents a flagrant example of deprivation of due process."

Are this Court's words to be ignored and are Judge Dusher's prejudice and preconceived opinions to be given precedence over the rulings of this Court? Chief Judge Major in his dissenting opinion expresses our view in 227 Fed. (2d) 896, at page 899:

> "Notwithstanding the solemn declaration by the Supreme Court and the courageous position of the Attorney General (of Illinois), the state court not understanding the mandate, conducted a hearing, decided that Marino had not been deprived of any constitutional right and ordered him returned to prison. *It thus reversed the decision of the Supreme Court.* In my judgment, the order was entered arbitrarily and without power or authority. Neither it nor the proceeding from which it resulted should be given any consideration by this or any other court or tribunal." (Italics ours)

Counsel for respondent mistakenly argue that this Court twice refused to review the action of the Circuit Court of Winnebago County. (Respondents' Brief, page

9). In *Marino* v. *Ragen,* 333 U.S. 852, the Attorney General of Illinois filed a motion for this Court's instructions to the Circuit Court of Winnebago County. This motion was denied because it was premature. The motion was made before the Circuit Court of Winnebago had acted. Secondly, Marino had not exhausted his remedies in the state courts. This Court is not in the habit of acting on motions by various parties as to the meaning and import of its decisions. Certainly, this Court was not passing upon the propriety of the Winnebago Court action.

Similarly, in *Marino* v. *Ragen,* 336 U.S. 969, Marino again filed a premature petition for certiorari without exhausting his remedies in the Illinois Courts under the new Illinois Post-Conviction Statute and by appeal or mandamus in the Illinois Supreme Court. Marino's procedure was bad but surely this Court did not even purport to pass upon the merits of petitioner's case. Indeed, Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge were of the opinion that certiorari should be granted despite the procedural defects.

We submit that this Court has never passed upon the validity or legality of Judge Dusher's arbitrary action against Marino. Nor has this Court passed upon the question as to whether its decision in *Marino* v. *Ragen,* 332 U.S. 561 takes priority over the decision of Judge Dusher in remanding the petitioner to the penitentiary.

The record in this case shows a judgment of conviction and then a finding by this Court that such judgment was unconstitutional and void because obtained in violation of due process of law. Manifestly this is not a collateral attack unless it can be said that respondent and the majority of the Court of Appeals are making a collateral attack on *Marino* v. *Ragen,* 332 U.S. 561.

It is significant that the cases cited in respondent's brief at page 10 are irrelevant and far fetched. In *Pino* v. *Nicolls,* 215 Fed. (2d) 237, there were two legal convictions.

In *U. S. ex rel. Weddeke* v. *Watkins,* 166 Fed. (2d) 369 there was a legal, unreversed judgment of record at the time of the deportation proceedings and the alien was seeking a delay to subsequently attack the judgment of conviction. That is wholly different from the case at bar.

In *U. S. ex rel. Knauer* v. *Jordan,* 158 Fed. (2d) 337, an alien whose naturalization as a citizen had been revoked because of fraud practiced in its procurement was ordered deported. His denaturalization had been affirmed by the Court of Appeals and this Court denied certiorari. He now sought to attack the denaturalization judgment again in the deportation proceedings. Of course, the court refused to permit him to do so. But this case is utterly different from the case at bar.

In *Dengeleski* v. *Tillinghast,* 65 Fed. (2d) 440, there was a valid judgment that the alien had been convicted of managing a house of prostitution. No attack had been made on the legality of the conviction. How this case is pertinent is difficult to comprehend.

U. S. ex rel. Robinson v. *Day,* 51 Fed. (2d) 1019, insofar as it is at all germane, supports the contention of the petitioner rather than that of respondent. In this case there were two sentences but only one judgment of conviction. The Court held the alien was not deportable.

Finally, *Gib* v. *Weedin,* 8 Fed. (2d) 489 is cited. In that case, an alien was convicted of a crime. No appeal was ever taken. Subsequently, in the deportation proceedings against him, he argued that the indictment in the original

criminal conviction action was defective and untenable. Of course, such a defense was unavailable in the deportation action.

These are the only cases cited by respondent. None is even remotely pertinent.

Counsel for respondent further argues on pages 6-8 of their brief that, after all, Judge Dusher did conduct a further hearing and did find that Marino did get a fair trial. We submit that in our petition for certiorari we showed how Marino did not and could not get a fair trial; that no counsel represented him; that he could not read, write or understand English; that he was not advised of his rights; that he did not sign the plea of guilty; that the arresting officer, Torren, was the interpreter and numerous other violations of legal rights.

But at this stage whether respondent's contention or petitioner's contention is correct is irrelevant. What is relevant and conclusive is that this Court found in *Marino* v. *Ragen,* 332 U.S. 561 that petitioner did not receive a fair trial and was denied due process of law. Neither Judge Dusher nor petitioner nor respondent nor respective counsel nor the Court of Appeals can change this Court's finding and decision. This fact should be beyond cavil.

To be sure, the Immigration authorities are bound by a valid judgment of conviction. By the same token they are bound by a United States Supreme Court decision that a judgment of conviction is invalid and unconstitutional. The latter represents the state of the record in this case.

Any subsequent tampering with the record by Judge Dusher *sua sponte* or by any one else holding further hearings can have, in the words of Chief Judge Major, "no more force and effect than if it had been entered in the nighttime by the janitor of the county courthouse."

Despite respondent's bold assertions on page 11 of his brief, we state categorically that Judge Dusher's actions subsequent to the decision of this Court in *Marino* v. *Ragen,* 332 U.S. 561 have never been directly reviewed or passed upon by this Court.

CONCLUSION.

The record in this case shows no legal conviction of record. Hence an order of deportation cannot be predicated thereon. Marino has suffered thirty years of agony in violation of his constitutional rights. Since his release on parole he has been an honorable, useful, desirable member of the community. It would result in a grave miscarriage of justice to permit the deportation order to stand. As succinctly stated in Judge Major's dissent (page 900):

> "It is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation."

It is most respectfully and sincerely urged that the petition for a writ of certiorari be granted and that therefore the order of the Court of Appeals be reversed and the petitioner discharged.

Respectfully submitted,

IRVING GOODMAN
EMIL M. CALIENDO and
NATHAN B. ENGELSTEIN
Attorneys for Petitioner